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In the

SUPREME COURT OF THE UNITED STATES

October Term, 1967

No. 766

DUNCAN MILLER,
Petitioner,

v.

SHELL OIL COMPANY,
Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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I

OBJECTION TO PETITION

1. A copy of the petition filed in this Court was received by respondent on the 6th day of November, 1967, together with a notice of the docketing of such petition on the 25th day of October, 1967. Such notice and copy of the petition were sent via regular mail contrary to the requirements of Rule 33 of this Court.

2. The petition does not designate the date of the order, judgment or decree sought to be reviewed, and the time of its entry, contrary to Rule 23 1 (b) (i) of this Court.

3. The petition does not comply with the requirements of Rule 23 1 (i) in that there is not appended thereto a copy of the order, judgment or decree sought to be reviewed.

4. The petition does not specify the date and terms of the order granting an extension of time within which to petition for certiorari contrary to Rule 23 1 (b)(ii) of this Court.

5. The petition does not show the basis for federal jurisdiction in the Court of first instance contrary to Rule 23 1 (g) of this Court.

6. Petitioner has failed to comply with Rule 21 of this Court requiring notice to respondent of the contents of the transcript of the record in this case certified to this Court.

7. Petitioner has not, within the contemplation of Rule 19 of this Court, shown any special and important reason for a review of this matter on writ of certiorari.

II

ARGUMENT IN OPPOSITION TO REVIEW ON CERTIORARI

Inasmuch as Petitioner is a resident of the State of Nevada (R. 1), Respondent, pursuant to Rule 11 (a) of the rules of the United States District Court for the District of New Mexico, filed therein its motion (R. 105) for an order directing petitioner to furnish sufficient security for respondent's costs. At a hearing conducted thereon held December 13, 1965, the District Court entered its order (R. 152-153) stating:

> "This matter coming on for hearing this date upon various motions pending relative to depositions, entry of default, and security for costs, and plaintiff not appearing and defendant appearing by its attorney, and it appearing to the Court that plaintiff has twice failed to appear for depositions and has never made a personal appearance in court or at any hearing in connection with this matter, and the cause being scheduled for trial on December 30, 1965, at Santa

> Fe, New Mexico, at 9:00 o'clock A.M., and it appearing to the Court the matter being a non-jury trial can best be expedited and handled by proceeding with the trial of the case, and reasonable cause appearing for the defendant's motion for security for costs; Now, Therefore,
>
> "IT IS BY THE COURT ORDERED that the plaintiff shall file with this Court an appropriate bond in accordance with the Rules of this Court in the sum of $1,000.00 for security for defendant's costs, said bond to be filed by December 27, 1967, failing in which the action will be dismissed, and all motions and notices to take depositions are denied and the case will come on for trial as scheduled, providing plaintiff has furnished a security for costs bond as required by this order."

Petitioner failed to comply with such order and further failed to appear either in person or by counsel for the trial set for December 30, 1965. (R. 185-186). The District Court, in announcing its decision in the action, stated:

> "The Court having received no – nothing in response to the order of the court requiring the cost bond, and further, the date scheduled for trial having come, the plaintiff not appearing in person or by an attorney, having never appeared in this jurisdiction, having never appeared in person or by an attorney in this Court, the Court further finding that, on the basis of all the evidence submitted, I probably should have given you summary judgment quite awhile ago, Mr. Hannahs, but out of an abundance of caution, carried the matter on up on this time, but I think it amounts to an abuse of process, by now."

and on January 6, 1966, entered its order (R. 162) stating:

> "This matter came on for trial before the Court sitting at Santa Fe, New Mexico, on the 30th day of December, 1965, the defendant appearing by its attorneys, Seth, Montgomery, Federici & Andrews, and Fred. C. Hannahs, and the plaintiff not appearing although due notice of such trial setting was given the plain-

tiff, and the plaintiff having never appeared in person or by an attorney at any time during the pendency of this cause, and it further appearing to the Court that the plaintiff failed to comply with the Order of the Court entered December 13, 1965, requiring the plaintiff to file a $1,000.00 cost bond on or before December 27, 1965, and said order having provided that the cause would be dismissed unless a cost bond was filed; Now, Therefore,

IT IS BY THE COURT ORDERED, ADJUDGED AND DECREED that the complaint be, and the same is hereby dismissed with prejudice and it is ORDERED that the defendant recover its costs herein."

Thereafter, petitioner prosecuted his appeal from the foregoing order to the United States Court of Appeals, Tenth Circuit, docketed therein as Cause No. 9110, which Court, following hearing at which petitioner also failed to appear, on May 24, 1967 entered the following order:

"This appeal is taken from an order of the United States District Court for the District of New Mexico dismissing appellant's case with prejudice for continued abuse of process. The record fully supports the judgment and appellant has failed to appear in this court and his appellate brief is totally unresponsive to the issues. The judgment is accordingly affirmed."

Petitioner, in his briefs filed with the Tenth Circuit Court of Appeals neither challenged nor discussed the trial court's order (R. 152) requiring the cost bond nor the trial court's dismissal (R. 162) of his complaint for failure to comply with such other order. Similarly, the petition herein is not addressed to and does not seek a review of the basis of the decision of the Tenth Circuit Court of Appeals affirming the trial court but seeks only a review of matters which were never passed upon by either the trial court or the Tenth Circuit Court.

Although the petition here appears to concern certain allegations of the petitioner's complaint (R. 1) and First

Amended and Supplemental Complaint (R. 14) alleging fraud, conspiracy and monopolistic practices on the part of the respondent, petitioner did not appear at any stage of the proceedings and did not introduce any evidence at all. Petitioner, therefore, should not be heard to complain.

CONCLUSION

We submit that petitioner has had more than adequate opportunity to have his day in court and that the petition for writ of certiorari be denied.

Respectfully submitted,

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